No. 12211.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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EVERT L. HAGAN, doing business as EL REY CHEESE Co.,

*Appellant,*

*vs.*

CENTRAL AVENUE DAIRY, INC.,

*Appellee.*

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## APPELLEE'S BRIEF.

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**Appeal from the United States District Court for the Southern District of California Central Division**

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BODKIN, BRESLIN & LUDDY,
453 South Spring Street, Los Angeles 13,
*Attorneys for Central Avenue Dairy, Inc., Appellee.*



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## TOPICAL INDEX

CASES PAGE

### Statutes



### Textbooks

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### I.

### Statement of Facts and Issues Presented by the Pleadings and Which Are Determinative of This Case.

On October 7, 1948, plaintiff, Title Insurance and Trust Company, filed its complaint in interpleader in the above entitled action in the District Court of the United States, Southern District of California, Central Division, under the provisions of the United States Code, Title 28, Section 1335, alleging that the defendants Evert L. Hagan and Central Avenue Dairy, Inc., did each demand of plaintiff that plaintiff pay to such respective defendants the sum of $1750.00 deposited by Evert L. Hagan on September 6, 1946 with plaintiff, in connection with its Escrow No. 249622 to be disbursed pursuant to instructions by both

of said defendants and praying for an order requiring said defendants to interplead concerning said claims. [Tr. pp. 2-6.]

The plaintiff deposited said sum of $1750.00 with the Registrar of the Court on the said 7th day of October, 1948. [Tr. pp. 6-7.]

Pursuant to the motion of plaintiff, summons was issued directed to said defendants and a restraining order was issued on October 7, 1948, restraining defendant from prosecuting any action in respect to said deposit until further order of the Court and ordering defendants to show cause why said injunction should not be made permanent. [Tr. pp. 9-11.]

On November 1, 1948, defendant Evert L. Hagan filed his answer, claim and cross-complaint in said proceedings in interpleader. By said answer it is alleged that defendant Central Avenue Dairy, Inc., a corporation, is a corporation organized under the laws of the State of Arizona, having its principal place of business in the City of Phoenix, State of Arizona. It is expressly admitted by said answer that said sum of $1750.00 was on deposit with plaintiff and that both of said defendants claimed said sum. By the prayer of said answer defendant Hagan asked that an interpleader be adjudged to be proper. [Tr. pp. 11-13.]

By the claim of Evert L. Hagan contained in the answer, claim and cross-complaint filed on the 1st day of November, 1948, he alleged that he was the manufacturer of two brands of cheese known respectively as "La Barca" and "El Rey Cheese" and that on November 8, 1938, Evert L. Hagan and Central Avenue Dairy, Inc., entered into a written contract whereby Hagan

granted defendant Central Avenue Dairy, Inc., the exclusive right to sell said two brands of cheese in the States of Arizona, New Mexico and Texas and whereby Central Avenue Dairy, Inc., agreed to sell and furnish the said two brands of cheese to Evert L. Hagan exclusively in the State of California at the prices set forth in said contract, and said claim further alleged that the contract recited that Hagan was indebted to Central Avenue Dairy, Inc., in the sum of $3795.04 which should be paid at the rate of one cent per pound over and above the prices scheduled in said contract and that said Hagan would order and purchase at least 9000 pounds of such two brands of cheese per month until said sum of $3795.04 should be paid in full.

The claim then proceeds to allege that on September 6, 1946, said sum of $1750.00 was deposited by Hagan with Title Insurance and Trust Company to secure to Central Avenue Dairy, Inc., full performance of said contract by Evert L. Hagan, said sum being so deposited in lieu of a certain promissory note in the sum of $3795.04 secured by a deed of trust and chattel mortgage theretofore given, which were provided for by the terms of said contract.

The claim then proceeds to allege that Central Avenue Dairy, Inc., had breached said contract in several respects, including the refusal to ship any more of said cheese at the prices specified in said contract and refused to make further shipments of El Rey Cheese and that Central Avenue Dairy, Inc., sold and delivered La Barba and El Rey Cheese to certain dealers in the City of Los-Angeles, County of Los Angeles, State of California, contrary to the terms of said agreement of November 8, 1938, and that in the month of August, 1945, Central Avenue Dairy, Inc., refused to ship any more of either

brand of cheese even though it is alleged that at that time 110,000 pounds of cheese still remained to be shipped under the terms of the said contract and that such conduct on the part of Central Avenue Dairy, Inc., rendered it impossible for Evert L. Hagan to perform his contract by paying the balance of said sum of $3795.04 at the rate of one cent per pound for each pound of cheese ordered by Evert L. Hagan and delivered by Central Avenue Dairy, Inc., to said Evert L. Hagan under the terms of said contract, and that such facts constituted a waiver of any right on the part of Central Avenue Dairy, Inc., to the balance of said sum of $3795.04 and to the sum of $1750.00 deposited in said escrow as security for the performance of said contract. Said claim concluded with a prayer that the Court adjudge that Evert L. Hagan alone was entitled to receive said sum of $1750.00. [Tr. pp. 13-22.] It is to be noted that Central Avenue Dairy, Inc., would be entitled to said deposit if Hagan breached his contract, but the breach of contract by Central Avenue Dairy, Inc., would not effect the rights of either to the deposit.

By Paragraph I of the cross-complaint filed with said answer and claim defendant Hagan incorporated Paragraphs I to IX, inclusive, of his claim as a part of his cross-complaint, which paragraphs are summarized above and by Paragraph II of said cross-complaint it is alleged that by reason of the asserted breaches of the written contract of November 8, 1938, defendant was damaged in the sum of $200,000.00 and prays a personal judgment

against Central Avenue Dairy, Inc., for such sum. [Tr. p. 22.]

It is to be noted, therefore, that by his answer defendant Hagan admits Title Insurance and Trust Company is entitled to an order of interpleader and by his claim he seeks a judgment *in rem* alleging that he is entitled to the $1750.00 deposited by him with Title Insurance and Trust Company as security for his performance of the contract of November 8, 1938, it being asserted that by reason of the alleged breach of said contract by Central Avenue Dairy, Inc., it waived all right to the unpaid portion of the balance of $3795.04 and to the amount deposited to secure the performance of said contract by Evert L. Hagan, while by the cross-complaint he seeks a personal judgment for damages in the sum of $200,000.00 alleged to have been caused by the breach of such contract by Central Avenue Dairy, Inc.

The return on service of writ filed herein discloses that the services of said answer, claim and cross-complaint on the therein named Kramer, Morrison, Roche and Perry was attempted to be made by B. J. McKinney, United States Marshal for the District of Arizona, acting through his Deputy, M. Cassie Baker, by the said M. Cassie Baker delivering to R. Wm. Kramer, member of firm and statutory agent for Central Avenue Dairy, Inc. by handing to and leaving a true and correct copy thereof with Mr. Kramer at 11:45 A. M., on the 9th day of November, personally at Phoenix in said District of Arizona, on the 9th day of November, 1948. Said re-

turn on service is set forth in the transcript at page 30 as follows:

"Return on Service of Writ

United States of America,
District of Arizona—ss:

Civil 8741-BH, So. Dist., Calif.

I hereby certify and return that I served the annexed Answer, Claim, Cross-Complaint of Defendant Complainant Hagan on the therein-named Kramer, Morrison, Roche and Perry by delivering to R. Wm. Kramer, member of firm and statutory agent for Central Avenue Dairy, by handing to and leaving a true and correct copy thereof with Mr. Kramer at 11:45 a. m. on the 9th day of November, personally at Phoenix in said District on the 9th day of November, 1948.

Service, $2.00; Travel, .06.

B. J. McKinney,
U. S. Marshal,
By /s/ M. Cassie Baker,
Deputy."

It is to be noted that the return does not purport to allege that a summons on said cross-complaint or any summons whatever was attached to said answer, claim and cross-complaint when it was delivered to R. Wm. Kramer, nor is the firm of Kramer, Morrison, Roche and Perry named as parties to said action.

The transcript also contains a "Return on Service of Writ" from which it appears that the copy of summons with attached copy of complaint in interpleader and order of injunction and for process was served on Edwin G. Geare, President of Central Avenue Dairy, Inc., per-

sonally, at Phoenix, Arizona, on October 19, 1948. This return is set forth at pages 31-32 of the transcript as follows:

"Return on Service of Writ

I hereby certify and return, that on the 14th day of October, 1948, I received the within summons and on October 19, 1948, served the Central Avenue Dairy, Inc., by delivering to Edwin G. Geare, President of Company, copy of Summons with attached copy of Complaint in Interpleader and Order of Injunction and for Process and showing him the original Summons at 10:15 a. m. at the Central Avenue Dairy, 3104 North Central Ave., Phoenix, Arizona.

Marshal's Fees: Travel, $.24; Service, $2.00; Total $2.24.

B. J. McKinney,
United States Marshal,

By /s/ M. Cassie Baker,
Deputy United States Marshal.

(Endorsed): Filed Nov. 3, 1948. (32.)"

On November 15, 1948, pursuant to the order to show cause issued October 7, 1948, the District Court made and entered its order restraining defendants from prosecuting any action in respect to said deposit. [Tr. pp. 33-34.]

The defendant Central Avenue Dairy, Inc., made no appearance nor response in respect to such order to show cause.

On November 22, 1948, defendant Central Avenue Dairy, Inc., appeared specially and filed its notice of motion to quash and set aside attempted service of process and to quash and set aside attempted service of answer, claim and cross-complaint of defendant Evert L. Hagan.

The grounds of said motion may be briefly summarized as follows:

1. That the delivery of a copy of the answer, claim and cross-complaint to R. Wm. Kramer on November 9, 1948, at the City of Phoenix, Maricopa County, State of Arizona, without any summons being attached to said cross-complaint was not sufficient to vest the District Court with jurisdiction over the person of the defendant Central Avenue Dairy, Inc., in respect to said cross-complaint;

2. That the delivery of a copy of said answer, claim and cross-complaint to R. Wm. Kramer personally as agent appointed pursuant to the laws of the State of Arizona to receive service of process for Central Avenue Dairy, Inc., without a summons upon said cross-complaint being attached thereto in the City of Phoenix, Maricopa County, State of Arizona, the said Central Avenue Dairy, Inc., not having made a general or special appearance in said action prior to the delivery of a copy of such answer, claim and cross-complaint to said R. Wm. Kramer was not sufficient to vest said District Court with jurisdiction over the person of the defendant Central Avenue Dairy, Inc., in respect to said cross-complaint;

3. That the mailing on October 30, 1948, of a copy of the said answer, claim and cross-complaint to Kramer, Morrison, Roche and Perry at the City of Phoenix, State of Arizona, as alleged attorneys for defendant Central Avenue Dairy, Inc., said defendant not having theretofore made a general or special appearance in said action, and a copy of the summons on the cross-complaint not having been attached to or mailed with said answer, claim and cross-

complaint, was not sufficient to vest the said District Court with jurisdiction over the person of the defendant Central Avenue Dairy, Inc. [Tr. pp. 35-37.]

It appears from the affidavit of Ed. A. Geare, President of Central Avenue Dairy, Inc., that Central Avenue Dairy, Inc., was incorporated under the laws of the State of Arizona on the 24th day of May, 1926, and never did any intrastate business in the State of California and never had an agent in the State of California, and has never maintained an office in California, and that any business which it may have had in California was wholly interstate in its nature. [Tr. pp. 38-39.]

It further appears from the affidavit of R. Wm. Kramer that when the United States Marshal for the District Court of Arizona, acting through one of its Deputies, delivered a copy of the answer, claim and cross-complaint in the above entitled action to him on November 9, 1948, Central Avenue Dairy, Inc., had not theretofore appeared in said action and that no summons on said cross-complaint was attached to said cross-complaint and that Central Avenue Dairy, Inc., did not then have any agent in California, nor was it doing any business in California. That there was no summons attached to the cross-complaint which was mailed to the law firm of Kramer, Morrison, Roche and Perry on October 30, 1948. [Tr. pp. 39-41.]

The motion of Central Avenue Dairy, Inc., to quash the service of said answer, claim and cross-complaint was granted December 20, 1948, and a judgment of dismissal as to said cross-complaint was filed December 31, 1948, and entered December 31, 1948, in Civil Order Book 55, page 44, in said District Court [Tr. pp. 44-47], from

which said judgment of dismissal said Evert L. Hagan appealed by filing his notice of appeal on January 3, 1949. [Tr. pp. 47-48.] Thereafter and on February 15, 1949, a default judgment was filed in said District Court adjudging that said Evert L. Hagan was entitled to the said sum of $1750.00 which was deposited with the Registrar of the Court pursuant to the order of November 15, 1948. [Tr. pp. 44-47.]

An examination of appellant's contentions and statement of points on appeal discloses that it is his contention that the delivery of the copy of the answer, claim and cross-complaint to R. Wm. Kramer at Phoenix, in the County of Maricopa, State of Arizona, as member of firm of attorneys who had not theretofore appeared for Central Avenue Dairy, Inc., in said action, and as statutory agent to receive service of process on behalf of Central Avenue Dairy, Inc., was sufficient to vest the District Court of the United States, Southern District of California, Central Division, with such jurisdiction over the person of the defendant Central Avenue Dairy, Inc., as to authorize such District Court to render a personal judgment in favor of Evert L. Hagan and against Central Avenue Dairy, Inc., on the cross-complaint for damages alleged to have been caused by the same breach of the same contract as gave rise to the conflicting claims to the $1750.00 deposited by Evert L. Hagan with Title Insurance & Trust Company.

It is clear from such statement of contention that appellant relies upon the provisions of Section 2361 of Re-

vised Title 28, U. S. Code, effective September 1, 1948 (formerly Section 41, subd. 26, Title 28, U. S. C. A. as amended by the adoption of Chapter 13 by the Second Session of the 74th Congress, 49 Statutes at Large, page 1096, on January 20, 1936), to justify the attempted personal service of the cross-complaint for damages upon the agent of Central Avenue Dairy, Inc., in the State of Arizona, by which cross-complaint it was sought to recover a personal judgment for $20,000.00 against Central Avenue Dairy, Inc., for allegedly the same breach of the same contract which gave rise to the alleged conflicting claims to the subject of the complaint in interpleader, namely, $1750.00 deposited with Title Insurance & Trust Company.

Section 2361 of Revised Title 28 of the U. S. Code provides as follows:

> "In any interpleader action, a district court may issue its process for all claimants and enter its order restraining them from instituting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. Such process and order shall be returnable at such time as the court or judge thereof directs, and shall be addressed to and served by the United States marshals for the respective districts where the claimants reside or may be found."

However, the provision for such service of process outside of the state in which the Federal Court is held is confined to process whereby it is sought to obtain jurisdiction

over non-residents of the district in which the court is held with respect to their claim against the subject of the interpleader action, but does not provide a means of obtaining jurisdiction over a defendant by service in another state against whom a personal judgment is sought by a cross-complaint filed by a codefendant, regardless of whether such cross-complaint arises out of the same breach of the same contract which gave rise to the conflicting claims to the subject of the action in interpleader. Apart from the provisions of Section 2361 of Revised Title 28 of the U. S. Code, which is confined strictly to interpleader proceedings, there is no authority making effective the service of a cross-complaint for damages, filed by a citizen of one state against a citizen of another state, outside of the state in which the court is held.

In no event was the service of the cross-complaint effectual in this case for at the time of the delivery of the cross-complaint to Mr. Kramer as agent appointed by defendant Central Avenue Dairy, Inc., to receive process for it, no summons was attached to such cross-complaint, such defendant not having appeared in the action at the time that said cross-complaint was so delivered to Mr. Kramer.

Furthermore, service of process issued out of a Federal Court held in a state other than that of the residence of an agent appointed to receive service of process is ineffectual for any purpose. Neither was the mailing of the copy of the cross-complaint without a summons attached thereto to Kramer, Morrison, Roche and Perry at Phoenix, Arizona, effectual for any purpose whatsoever.

## ARGUMENT.

### I.

### Section 2361 of Revised Title 28, U. S. C. A., Does Not Authorize or Warrant the Service Outside of the State in Which the District Court Is Held of a Cross-Complaint Filed by a Defendant in an Interpleader Action Against a Codefendant Whereby a Personal Judgment for Damages Is Sought by Such Cross-Complaint.

It appears from the return on service of writ [Tr. p. 30] that said cross-complaint, without a summons being attached thereto, was served on Kramer, Morrison, Roche and Perry by delivering to R. Wm. Kramer, member of firm and statutory agent for Central Avenue Dairy, Inc., by handing to and leaving a true copy thereof with R. Wm. Kramer at Phoenix, Arizona, on November 9, 1948. There is no allegation that any service was made on anyone who was the agent of Central Avenue Dairy, Inc., it not being stated that Kramer, Morrison, Roche and Perry were attorneys or the statutory agent for Central Avenue Dairy, Inc., and it further appearing that neither Kramer, Morrison, Roche and Perry, nor R. Wm. Kramer, were named as parties to said cross-complaint.

Even though the return of the Marshal had shown the service of the answer, claim and cross-complaint on R. Wm. Kramer as the statutory agent of Central Avenue Dairy, Inc., at the City of Phoenix, Maricopa County, in the State of Arizona, such service would have been ineffectual to acquire jurisdiction over the person of the defendant Central Avenue Dairy, Inc., in respect to the

alleged cause of action for a personal judgment against Central Avenue Dairy, Inc., for damages, for Rule 4F of Federal Rule of Procedure only authorizes service of process in the state in which the court is held, unless some statute of the United States expressly provides for service outside of the state in some particular case.

Section 2072 of Revised Title 28, U. S. Code, provides: "Nothing in the title, anything to the contrary notwithstanding, shall in anywise limit or repeal any such rules heretofore prescribed by the Supreme Court." This, of course, leaves Rule 4F in full force and effect.

Our contention in this behalf is determined beyond dispute in *Stitzel-Weller Distillery, Inc., v. Norman and Stitzel-Weller Distillery, Inc., v. Hartman,* 39 F. 2d 182. In that case the plaintiff brought two actions which were consolidated for trial seeking to have the conflicting claims to certain warehouse certificates issued by plaintiff determined. In Case No. 54 receipts for 56 barrels of whiskey were issued by plaintiff to Penfield Company, which receipts were transferred by Penfield Company to Norman and by Norman sold to E. Mugge Company, a Florida corporation, on June 22, 1938. The latter transaction was handled by a broker named Fisher who gave Norman trade acceptances drawn by E. Mugge Company on the Wauchula State Bank. On June 23, 1938, E. Mugge Company sold to Collins-Newman Company, a Kentucky corporation, receipts for 75 barrels of whiskey, including the 59 barrels originally owned by Norman. Collins-Newman Company immediately sold such receipts to R. L. Buse Company, an Ohio corporation. R. L. Buse Company thereafter sold receipts for 25 barrels of such whiskey to A. M. O'Connell.

In Case No. 58 receipts for 350 barrels of whiskey were issued by plaintiff to the Penfield Company and sold by Penfield Company to F. H. Hartman in 1936. On May 23, 1938, Hartman sold receipts for 200 barrels of such whiskey to E. Mugge Company. This last mentioned transaction was handled by Fisher, the same broker who had represented E. Mugge Company in the sale made by Norman to Mugge Company, above mentioned. Fisher also delivered to Hartman trade acceptances drawn by E. Mugge Company on the Wauchula State Bank. On May 23, 1938, Fisher sold receipts for the same 200 barrels of whiskey to Collins and Newman Co., representing that such whiskey belonged to him personally. At the same time Fisher sold to Collins and Newman Company receipts for 150 barrels of whiskey which he represented belonged to E. Mugge Company. Fisher cashed the check given for the receipts for the 200 barrels which he represented belonged to himself and E. Mugge Co., cashed the check given for the receipts for the 150 barrels which were represented to belong to E. Mugge Company.

On May 25, 1938, E. Mugge Company sold receipts for 200 barrels of whiskey to defendant R. L. Buse Company and receipts covering 150 barrels to Kentucky Distillers Receipts Corp., which latter corporation sold receipts for 100 barrels of whiskey to Griggs-Cooper & Company, a Minnesota corporation. The trade acceptances given by E. Mugge Company were not paid at maturity. Both Norman and Hartman repudiated their respective sales to E. Mugge Company claiming such sales were induced by the fraudulent representations of Fisher, the defendant bank and its President Crews and filed their cross-claims against Crews, Wauchula Bank, Cooper as Trustee for E. Mugge Company, Collins and Newman Company, R. L. Buse Company, Kentucky Distillers Receipts Cor-

poration and Griggs-Cooper & Company alleging fraudulent conspiracy to defraud them of their receipts and praying for a personal judgment for the value of the receipts if it was legally impossible to return the receipts to them. The evidence showed that the bank and its president controlled the affairs of E. Mugge Company and that Fisher was an agent for the bank and E. Mugge Company in negotiating the sale of the receipts and as such agent represented that E. Mugge Company was financially responsible when in fact it was practically insolvent. The Court held that the title of R. L. Buse Company, Kentucky Distillers Receipts Corporation, O'Connell and Briggs-Cooper & Company was good as against Norman and Hartman and that Collins and Newman were not liable in tort to either Norman or Hartman, it appearing that Collins and Newman purchased the receipts in good faith.

The cross-defendant R. L. Buse Company was served in Ohio and the cross-defendant Cooper, as trustee in bankruptcy for E. Mugge Company, Wauchula State Bank and Crews were served in Florida, that is, outside of the State of Kentucky, in which the Court in which the action was pending, was sitting.

R. L. Buse Company appeared and filed objections as to the jurisdiction over it in respect to the cross-complaint and the other three cross-defendants failed to answer and did not appear.

The Court in holding that no jurisdiction was acquired in respect to the cross-complaint as to those cross-defendants served outside of the State of Kentucky because the provisions of Section 41, Subdivision 26, 28 U. S. C. A., as amended January 20, 1936, and set forth in Chapter 13 of the Second Session of the 74th Congress, 49 Statutes at Large, page 1092, and now contained in Section 2361

of Revised Title 28, U. S. Code, only provided a means of acquiring jurisdiction over such defendants in respect to their claim to the warehouse receipts but not in respect to the cause of action set forth in the cross-complaint by which a personal judgment was sought against such non-residents of Kentucky, said at pages 187-8:

> "Except where specifically authorized by a Federal statute, the civil process of a Federal District Court does not run outside the district and service outside the district is void. *Toland v. Sprague,* 12 Pet. 300, 9 L. Ed. 1093; *Munter v. Weil Corset Company,* 26 U. S. 276, 43 S. Ct. 347, 67 L. Ed. 652; *Robertson v. Railroad Labor Board,* 268 U. S. 619, 45 S. Ct. 621, 69 L. Ed. 1119; *Employers Reinsurance Corp. v. Bryant,* 299 U. S. 374, 57 S. Ct. 273, 81 L. Ed. 289. Norman and the Hartman Company claim that jurisdiction is acquired by virtue of the provisions of Section 41(26), 28 U. S. C. A., which authorized the present interpleader proceeding. That statute does provide that the court in which the interpleader suit is filed shall have power to issue its process against all claimants and to issue an order of injunction against each of them, enjoining them from prosecuting any proceeding in any other court with respect to the money or property involved, which process and order of injunction shall be addressed to and served by the United States marshal 'for the respective districts wherein said claimants reside or may be found.' This statute confers jurisdiction over all the refendants served, even those residing in Ohio and Florida, with respect to their claims against the warehouse receipts. It does not confer jurisdiction over defendants in another state against whom a personal judgment is sought by a cross-bill filed by a codefendant. Such a proceeding is not an interpleader proceeding, and in such a proceeding the cross-defendants are

not 'claimants' as provided by the statute, but they are defendants in an action *in personam*. Although it might be desirable to dispose of all related claims in the one action and cross-defendants could accomplish this result by entering their appearance, yet the right to raise the jurisdictional question plainly exists if they prefer to have such question of personal liability disposed of in a separate proceeding. Although the court has jurisdiction in the interpleader proceeding and the venue in that phase of the controversy is proper under Section 41 (26), 28 U. S. C. A., yet the venue of the cause of action asserted by the cross-bill would not be proper if the cross-bill is treated as an independent proceeding. Section 51 of the Judicial Code; 28 U. S. C. A. 112; *Richard v. Franklin County Distilling Co.,* D. C. W. D. Ky., 38 F. Supp. 513, decided April 16, 1941, and cases therein cited. Although the question of venue may be waived by such cross-defendants as have failed to answer or to object (*Commercial Casualty Ins. Co. v. Consolidated Stone Co.,* 278 U. S. 177, 49 S. Ct. 98, 73 L. Ed. 252), yet it is also necessary that the court acquire jurisdiction over the person of the defendant before the claim for personal judgment can be adjudicated. See *Employers Reinsurance Corp. v. Bryant, supra.* The cross-defendants in Ohio and Florida are accordingly not before the court. Such defendants as are before the court under the cross-bills were not, in my opinion, the perpetrators of the fraud complained of, nor connected with it in such a way as to impose any personal liability upon them under the respective cross-claims of Norman and the Hartman Company. Accordingly, the cross-claims are dismissed."

It is clear that the jurisdiction conferred upon the Court by virtue of the service of process outside of the state in

which the Federal Court is situated pursuant to the provisions of Section 2361 of the Revised Title 28 of the U. S. Code is limited to the rendition of a judgment *in rem* whereby the conflicting claims to the subject of the complaint in interpleader may be determined but does not extend to the rendition of a personal judgment against such nonresidents on a cross-complaint served and filed by a defendant in an action in interpleader against a co-defendant, served outside of the state in which the court is held, even though the cause of action set forth in such cross-complaint is based on the same breach of the same contract as that which gave rise to the conflicting claims to the subject of the action in interpleader. This is so, for as the Court pointedly declared at page 188:

> "Such a proceeding is not an interpleader proceeding, and in such a proceeding the cross-defendants are not 'claimants' as provided by the statute, but they are defendants in an action *in personam.*"

In other words, in accordance with the well established rule, substituted service by means of personal service in a state other than that in which the court is held is only sufficient to authorize the rendition of a judgment *in rem* and does not authorize the rendition of a judgment *in personam.*

Moreover, if it be contended that the decision in *Stitzel-Weller Distillery v. Norman, supra,* is not conclusive in the instant case because the acts which gave rise to the conflicting claims to the warehouse receipts were not the same acts as those which gave rise to the cross-complaint of Norman and Hartman for damages for fraud, we reply that such contention is not tenable for the Court in holding that the fraudulent acts of Fisher, Crews, the bank

and E. Mugge Company were such as to render the title of Norman and Hartman to the receipts subject to the claims of R. L. Buse Company, Kentucky Distillers Receipts Corporation, O'Connell and Griggs-Cooper & Company, said at 186:

> "It appears well settled that the warehouse receipts in question have such a quality of negotiability as will protect a holder who has acquired them by purchase in good faith without knowledge of any defects in the title of his vendor. Kentucky Statutes, Section 4770; *Theis v. Canmann & Co.,* 59 S. W. 1093, 22 Ky. Law Rep. 1097; *Flexner v. Meyer's Executor,* 191 Ky. 133, 229 S. W. 99. With respect to the purchasers from Collins and Newman Company in both cases, namely, R. L. Buse Company, Kentucky Distillers Receipts Corporation, Arthur M. O'Connell and Griggs-Cooper and Company, the evidence completely failed to connect them in any way with the alleged fraudulent transactions or to attribute to them any knowledge or notice of the alleged defective title acquired by E. Mugge Company and subsequently purchased by Collins and Newman Company. The court finds that each of said purchasers was a purchaser for value without notice and that the title acquired in each instance is good as against the claims of J. W. Norman and F. H. Hartman, Inc. Accordingly Norman and Hartman Company have no valid claims to the receipt transferred by them to Fisher and now held by these claimants, irrespective of the conditions under which Collins and Newman Company acquired them from Fisher."

Notwithstanding such facts the Court held that it had not acquired such jurisdiction over the person of the defendants served with the cross-complaint outside of the State of Kentucky as to enable it to determine the cause

of action alleged therein for personal judgment for damages for fraud based on the same fraudulent acts of Fisher, Crews, the bank and E. Mugge Company, which subjected the titles of Norman and Hartman to the claims of R. L. Buse Company, Kentucky Distillers Receipts Corporation, Arthur M. O'Connell and Briggs-Cooper & Company.

However, it is immaterial whether the cause of action set up in the cross-complaint arose out of the same facts as those which gave rise to the conflicting claims to the subject of the interpleader action for Section 2361, Revised Title 28, U. S. Code, does not warrant the rendition of a personal judgment upon a cross-complaint served upon the defendants outside of the state in which the court is held.

The case of *Stitzel-Weller Distillery v. Norman, supra,* is the only case that an exhaustive research has disclosed which presents the question here involved. While the decision is that of a District Court the reasoning is so convincing that the cross-complainants were apparently of the opinion that an attempt to reverse it by appeal would be of no avail.

Neither does the fact that such service was attempted to be made on an agent appointed to receive service of process alter the rule. In *Junk v. Reynolds Tobacco Co.,* 24 Fed. Supp. 716, the Court said at page 719:

> "Likewise in Bonghim v. Hope Production Company, 58 Fed. (2d) 1046, it was held that process issued in one district and served upon a designated agent in another district of the same state was ineffectual."

By the adoption of Rule 4F of the Federal Rules of Procedure the territorial limits of the Court were made co-extensive with those of the state. However, service on an agent, or on a defendant, outside of the state is ineffectual.

The three cases cited by the appellant in this connection are all state court decisions and necessarily do not in anywise consider the effect of the provisions of Section 2361 of Revised Title 28, U. S. Code. A brief examination of these cases discloses that they are in nowise in point.

In *Irvin v. Ratliff,* 94 Ind. 583, plaintiff brought an action for the balance due on a construction contract against Ratliff and Bundy. Ratliff answered admitting he held certain money under a contract to pay therefrom the amount due from plaintiff to Bundy and that Bundy claimed the whole thereof and prayed that the controversy between plaintiff and Bundy be determined. On appeal it was held that the trial court properly rendered a judgment for Bundy against plaintiff for an amount in excess of the amount of money held by Ratliff.

In *Provident Savings & Loan Assn. v. Booth,* 293 N. W. 293, plaintiff filed a complaint in interpleader in respect to a credit of $274.00 on account of shares of plaintiff, naming Booth and Securities Investment Corporation as defendants. Booth filed a cross-complaint against Securities Investment Corporation for $800.00 alleged to be due from the latter to the former, such sum being the amount paid by Booth to Securities Investment Corporation for a tractor which was returned. Walker, as trustee for Booth, had a judgment against Securities Investment Corporation for $1100 with an order to apply thereto the sum paid into court. The judgment was affirmed.

The other case cited is that of *Seattle v. Turner,* 29 Wash. 515. In that case plaintiff filed an action in interpleader to determine conflicting claims to a warrant issued by the city for $478.00. The defendant Hall filed a cross-complaint seeking judgment for $517.00 for street work performed by cross-complainant and asking that she be declared to have a lien on the warrant. The trial court refused such relief to Hall. On appeal it was held that Hall was entitled to the relief prayed for.

However, none of such decisions are of any avail to appellant herein for in each of such cases the action was pending in a state court and all defendants were residents of and served within the state within which the Court was sitting and all appeared. It is obvious that Section 2361 of Revised Title 28, U. S. Code, had no application whatever in any of these cases and it is only by virtue of such section that even a complaint in interpleader in a Federal Court action may be served outside of the state in which the Federal Court is held, but such section does not vest the Federal Court with jurisdiction over the person of a nonresident defendant in respect to a cause of action stated in a cross-complaint whereby a personal judgment is sought against such nonresident defendant.

Furthermore, it is to be noted that it is alleged in Hagan's claim contained in his answer, claim and cross-complaint that the $1750.00 was deposited by Hagan with Title Insurance & Trust Company to secure to Central Avenue Dairy, Inc., full performance of the contract of November 8, 1938, by Hagan. [Tr. p. 18.] Hence the only question to be decided in order to determine who was entitled to said $1750 was whether or not the contract had been performed by Hagan. The question of whether defendant Central Avenue Dairy, Inc., had or had not per-

formed its contract was immaterial. It surely follows that the determination of the cause of action alleged in the cross-complaint predicated on the alleged breach of the contract by Central Avenue Dairy, Inc., has absolutely nothing to do with the question of who is entitled to the $1750 deposit. Our contention in this behalf is amply sustained by the holding in *Metropolitan etc. Co. v. Margolis,* 38 Cal. App. 711. In that case plaintiff, as surety upon a bond given to guarantee the performance of a contract for street improvements, brought an action against its principals, Margolis and Stullman, to recover money which plaintiff had paid to satisfy a judgment obtained against the principals and the surety for damages for breach of a contract between the County of Los Angeles and the principals under the bond. The defendant principals, together with a corporation, filed a cross-complaint against third persons who had breached their contract with the principals, by which contract such third parties had agreed to install the same improvements as those covered by the contract between the principals and the county. The cross-complainant appealed from an order granting the motion to strike out the cross-complaint. The Court in holding that the cause of action set forth in the cross-complaint did not bear the necessary relation to the cause of action set forth in the original complaint, said at pages 714-715:

> "In such a situation, can defendants join with a stranger to the action and file a cross-complaint, not against the plaintiffs in the initial action, but against third parties, to recover damages for breach of an agreement to which the plaintiff was not a party? We think not.
>
> . . . . . .

"The validity of the cross-complaint herein therefore depends upon whether it comes within the 'contract' or 'property' clauses of the section, and this must be determined from the facts surrounding the cause of action and not particularly from the form of the complaint. In the case before us the cause of action stated in the original complaint was for recovery of moneys paid by plaintiff surety company on behalf of defendants, while the cross-complaint attempted to add a stranger as a cross-complainant and to recover damages from third parties for a breach of an agreement between such third parties and cross-complainants relating to the installation of certain improvements. Instead of being 'related' to the same transaction or contract, each claim is foreign to the other."

Title Insurance and Trust Company, the plaintiff in the original action in interpleader, was not a party to the cheese sales contract. Inasmuch as the contract upon which the cross-complaint is predicated is not related to the contract in reference to the deposit, it is clear that the cross-complaint was not proper in any event. Such being the case it cannot be said that the cause of action set up in the cross-complaint is germane to the claim for the deposit.

Of course, apart from the provisions of Section 2361 of Revised Title 28, U. S. Code, there is no provision for the service of federal process outside of the state in which the Federal Court by which the process is issued sits.

In *Blank v. Bitker,* 135 F. 2d 962, plaintiff brought an action on a contract of guaranty in the United States District Court for the Northern District of Illinois. The defendant, a resident of Wisconsin, was served with process in Wisconsin. The Court in holding that no

jurisdiction of the person of defendant Bitker had thereby been acquired, said at page 965:

> "Several reasons lead us to believe that the District Court never gained jurisdiction over Bitker. Rule 4(f) of the Federal Rules of Civil Procedure, 28 U. S. C. A., following section 723c, provides that, except where a federal statute states that process may run throughout the United States, process 'may be served anywhere within the territorial limits of the state in which the district court is held.' Bitker was served in Wisconsin, outside the boundaries of Illinois. Hence he was beyond the territorial limits of effective service."

See also:

*Moreno v. United States,* 120 F. 2d 129;

*Miss. Pub. Corp. v. Murphree,* 90 L. Ed. 185.

Neither was the mailing of the cross-complaint to Kramer, Morrison, Roche and Perry at Phoenix, Arizona, effectual.

In *Hess v. Palowski,* 71 L. Ed. 1091, the Court said at page 1094:

> "Notice sent outside the state to a nonresident is unavailing to give jurisdiction in an action against him personally for money recovery."

Moreover, no order of court was ever made for the attempted substituted service herein, nor was there any mailing to the defendant.

The judgment of dismissal in respect to the cross-complaint was properly rendered herein.

## II.

## If a Cross-Defendant Has Not Appeared in an Action at the Time of the Attempted Service of the Cross-Complaint It Is Essential That a Summons on the Cross-Complaint Be Attached Thereto.

It appears from the affidavit of R. Wm. Kramer that no summons was attached to the cross-complaint which was delivered to him by the United States Marshal on November 9, 1948, and that there was no summons attached to the cross-complaint which was mailed to Kramer, Morrison, Roche and Perry on October 30, 1948. [Tr. pp. 39-41.] In this connection appellant quotes Rule 5, Subdivision (a) of Rules of Federal Procedure, which requires all papers to be served on the parties affected thereby, provided that service need not be made on parties in default except that pleadings asserting new or additional claims must be served upon them in the manner provided for service of summons in Rule 4.

The summons issued upon the complaint in interpleader required defendant Central Avenue Dairy, Inc., to serve its answer upon plaintiff's counsel within twenty days after the service of summons exclusive of the date of service. [Tr. p. 31.] The complaint in interpleader was served on Ed G. Geare, President of Central Avenue Dairy, Inc., on October 19, 1948, at 10:15 A. M. [Tr. pp. 31-32.] Accordingly defendant Central Avenue Dairy, Inc., was required to serve its answer by November 8, 1948, and was, therefore, in default in respect to the complaint in interpleader when the United States Marshal attempted to serve the cross-complaint on R. Wm. Kramer on November 9, 1948, at 11:45 A. M. The cross-complaint clearly asserted an additional claim against Central Avenue Dairy, Inc. It follows that the quoted section

clearly required the service of the summons on the cross-complaint for Rule 4, Subdivision (d), provides "the summons and complaint should be served together." Appellant also quotes Subdivision (f) of Rule 4, which provides that process may be served beyond the territorial limits of the state when the statute of the United States so provides.

Apart from Section 2361 of Revised Title 28, U. S. Code, which applies exclusively to interpleader actions, there is no statute which authorizes process to be served outside of the state in which the Federal Court is held in an action whereby a personal judgment is sought by an individual resident of one state against an individual resident of another state. Moreover, there is no provision in the Federal Rules of Procedure in respect to the method of serving a cross-complaint, even within the territorial limitations of the state in which the Court is held, where the cross-defendant has not theretofore appeared in the action, particularly in respect to the question of whether a summons must be issued upon and served with the cross-complaint. Under such circumstances the state statute governs.

In *Felgemaker v. Ocean Accident & Guarantee Corp.*, 47 Fed. Supp. 660, the Court said at page 663:

> "United States courts are bound by the Rules of Civil Procedure (Rule 1) and are therefore not obliged to follow state procedure. They should, however, give effect to state rules of practice if not inconsistent with federal rules (Rule 15 (d), Rules of Civil Procedure) especially when such practice serves the ends of established federal law."

Section 442 of the Code of Civil Procedure of the State of California provides as follows:

> "If any of the parties affected by the cross-complaint have not appeared in the action, a summons upon the cross-complaint must be issued and served upon them in the same manner as upon the commencement of an original action."

In *Herriage v. Texas etc. Ry. Co.,* 11 F. 2d 671, the Court said at page 671:

> "As to foreign or nonresident corporations, in the absence of a federal statute, the law of the state is followed for making service; but this does not carry the right to a Federal District Court to send its process beyond its territorial limits."

Appellant cites *United States v. Murphy,* 82 Fed. 893, to the following effect:

> "Process embraces all steps and proceedings in a cause from its commencement to its conclusion."

The language of the Court is as follows:

> "The legal meaning of the word 'process' varies according to the context, subject-matter, and spirit of the statute in which it occurs. The process of the court, in its narrowest sense, means the writs and mandates of the court under the seal thereof.
>
> "In its largest sense, process is equivalent to procedure, including all the steps and proceedings in a cause from its commencement to its conclusion."

It is obvious that it is in the narrower sense that the word "process" as used in Rule 4 of the Rules of Federal Procedure.

The portion of the pleading designated "answer, claim and cross-complaint" by which a personal judgment for damages is sought against Central Avenue Dairy, Inc., must be deemed to be a cross-complaint as it seeks relief against a coparty rather than an opposing party.

Subdivisions (a) and (b) of Rule 13 of Rules of Federal Procedure provide that a counterclaim may be filed against an opposing party and Subdivision (g) of such Rule provides that a cross-complaint may be filed against a coparty. However a counterclaim cannot be asserted against a coparty because a counter claim must state a cause of action in favor of the defendant and against the plaintiff. (See: *Gorton Bridge Mfg. Co. v. American Bridge Co.,* 151 Fed. 871.)

Appellant then quotes from Cyclopedia of Federal Procedure (2nd Ed.), Vol. 4, page 85, to the effect that no process on a counterclaim is necessary to bring in a plaintiff or defendant. This statement is obviously inapplicable to the present case for the pleading by which Hagan seeks a personal judgment against his codefendant Central Avenue Dairy, Inc., is properly designated and must be considered as a cross-complaint rather than a counterclaim because a counterclaim will not lie against a codefendant. One of the cases cited in support of the quoted text is that of *Grossman v. United States,* 280 Fed. 683. In that case it was simply held that the omission in not having a summons issued and served on a cross-complaint was cured by the filing of an answer thereto and by the participation in the trial by the cross-

defendant. The rule is undoubtedly correctly stated by the United States Supreme Court in *Smith v. Woolfolk,* 29 L. Ed. 357, at 359 as follows:

> "It is settled that one defendant cannot have a decree against a codefendant without a cross bill, with proper prayer, and process or answer, as in an original suit."

Appellant then quotes from Hughes' Federal Practice, 1940 Ed., page 226, to the effect that if the original summons and complaint has been served under Rule 4, the Court may exercise that jurisdiction in connection with anything related to the case and arising because of it. However no authority is cited in support of the text and obviously it has no application to interpleader actions in which it is sought to obtain a personal judgment on a cross-complaint without a summons being issued thereon. The rule applicable in the present case is that set forth at a point shortly preceding appellant's quotation from Hughes' Federal Procedure and is found at pages 226-7 as follows:

> "It would seem logical that service of one summons should be sufficient to inform the party that suit has been brought against him and should be sufficient to give the court jurisdiction of all claims arising in the same action. On the other hand, it might be argued that a new claim asserted by a codefendant, a third party defendant, or an intervenor—in short, by anyone other than the original plaintiff—is virtually a new suit against the same defendant, although one which will be adjudicated in the same action as the

original claim, and consequently a new summons should issue.

"However, the wording of the section is that service shall be made 'in the manner prescribed for service of *summons*' (italics ours) and not 'for service of process,' which would clearly indicate that a new summons was necessary."

It must be concluded that a summons on a cross-complaint would have been necessary in order to make a valid service of the cross-complaint even within the State of California if such service was attempted to be made before the defendant had appeared in the action. Such being the case the service of the cross-complaint outside of the State of California without a summons having been issued in respect thereto and received therewith would be wholly ineffectual for two distinct reasons, first, such cross-complaint could not be effectually served outside of the State of California even though summons on the cross-complaint had been issued and served therewith. (See: *Stitzel-Weller Distillery, Inc. v. Norman, supra*), and second, no summons was issued or served with such cross-complaint.

## III.

**Appellant's Contention That the Acquisition of Jurisdiction of the Parties in Respect to the Complaint in Interpleader Vested Jurisdiction in the Court to Determine the Issues Presented by the Cross-Complaint Is Untenable.**

A brief examination of the cases cited by appellant in this behalf will show them to be wholly inapplicable.

In *Mathis v. Ligon,* 39 F. 2d 455, cited by appellant, plaintiff brought an action to cancel a tax deed to Mathis. By a cross-complaint Mathis sought to quiet title against plaintiff and other defendants. While the Court found that the tax deed to Mathis was void it held that it had jurisdiction to adjudicate the issues raised by the cross-complaint of Mathis. This is of no avail to appellant herein as no personal judgment was sought and no service of process outside of the State was involved.

In *Barnett v. Mayes,* 43 F. 2d 521, cited by appellant, an action in the nature of a creditor's bill was commenced to foreclose a mechanic's lien upon 40 acres of oil land alleged to have been owned by one Mayes. The defendant Barnett answered alleging ownership of 80 acres in addition to the 40 acres described in the complaint. The trial court found in favor of Mayes in respect to the entire 120 acres. The judgment was affirmed, the Court holding contrary to Barnett's contention that the Court had jurisdiction over the entire tract.

In *Jones v. St. Paul Fire & Marine Ins. Co.,* 108 F. 2d 123, cited by appellant, the insured had judgment on a policy of fire insurance which was reversed. Thereafter

the insured moved for a summary judgment for the amount of the premiums pursuant to amended pleadings filed without leave of Court. Upon appeal it was held that the Court would have had jurisdiction to determine the rights to the premiums if leave had been secured to file the necessary amended pleadings.

In *Sun Oil Co. v. Burford,* 130 F. 2d 11, cited by appellant, plaintiff sought to cancel an oil permit issued to Burford, it being alleged that the latter was procuring more than his share of the oil from the tract. Upon a rehearing the Court held that the Federal Court having acquired jurisdiction based on diversity of citizenship it has power to decide all issues under both State and Federal law and therefore had jurisdiction to enforce the State Conservation Act.

In *El Paso & S. W. R. Co. v. Arizona Corp. Com.,* 51 F. 2d 573, cited by appellant, plaintiff sought an order restraining defendant Commission from enforcing the reparation order of the defendant Commission on the grounds that the order was a violation of the Fourteenth Amendment to the Federal Constitution in that the penalty for violation thereof was so severe as to deprive plaintiff of its property without due process of law. The Court held that the assertion of the violation of the Federal Constitution gave the Federal Court jurisdiction to determine all questions in the case even though it did not pass upon the federal question at all and decided the case on local and state questions alone.

In *United States v. Pryor,* 2 Fed. Rules Service, 197, (U. S. Dist. Ct., No. Dist. of Ill.), cited by appellant, plaintiff, as assignee of the North American Finance Corp., brought an action against the maker of a promissory note. The Court held that a counter-claim for affirma-

tive relief by way of damages for fraud against the party from whom the maker of the note purchased a stoker was proper, the note having been executed for a loan which was guaranteed by the United States under the National Housing Act. It will be noted that the case did not involve the service of a counterclaim outside of the State of Illinois in which the Court was held.

In *Sherman Nat. Bank v. Shubert Theatrical Co.,* 238 Fed. 225, cited by appellant, a New York corporation brought an action in the Federal District Court of New York in the nature of a bill in interpleader to determine conflicting claims to a bank deposit. The Shubert Theatrical Company filed its answer and moved for the dismissal of the action. The plaintiff also claimed an interest in the deposit as assignee of the depositor. The trial court held that the action in interpleader was ancillary to an action at law theretofore commenced in the New York Court by Shubert Theatrical Company, a New Jersey corporation, one of the claimants in the instant action. The trial court held that it had jurisdiction to determine all of the claims regardless of the fact that the Shubert Theatrical Company was a New Jersey corporation. The opinion upon appeal by the Shubert Theatrical Company is found at 247 Fed. 265. It was there held that the deposit constituted the *res* and that as the nonresidence claimant was the plaintiff in the prior action at law the Court had jurisdiction to proceed against the nonresident who had filed its answer. However, in holding that the rights of the persons outside of the State of New York in respect to personal controversies would not be prejudiced by the final judgment, said at page 258:

> "The answer of the Shubert Theatrical Company of New Jersey put the complainant on proof of its

case. The answer of the Welden National Bank admitted the allegations of the bill and prayed for similar relief. The record is defective in failing to show the citizenship of the defendants not answering, or whether the subpoena was or was not served upon them, or whether they were or were not beyond the jurisdiction of the court.

"In the case of a *res* within the jurisdiction of the court the interests of persons without the jurisdiction are determined and disposed of as provided in section 57 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1102, Comp. St. 1916, Par. 1039). In the case of personal controversies, the rights of parties without the jurisdiction will not be prejudiced by the final decree in the cause. Equity rule 39 (198 Fed. XXIX, 115 C. C. A. XXIX)."

It is to be noted that in the case of *Sherman National Bank v. Shubert Theatrical Company, supra,* there was no attempt by any of the claimants to recover a personal judgment against any of the parties to the action. This fact distinguishes the case from the one at bar.

In the case of *United States v. American Surety Co.,* 25 Fed. Supp. 700, cited by appellant, the *use plaintiff,* being a subcontractor, brought an action in the name of the United States against the surety on a *payment* bond furnished by the defendant general contractor. The appellant herein quotes from this case to the effect that the general contractor was required to assert all counterclaims he had against the *use* plaintiff, that is, the subcontractor. However, this case is of no avail to appellant herein as the Court expressly pointed out that all of the parties were New York corporations and as such were residents of the State of New York, excepting the United States, in which name the action was commenced.

It follows that no case relied on by appellant in the slightest degrees bears on the question here presented.

Moreover, the cause of action for damages must be deemed to be a cross-complaint, rather than a counterclaim, as a counterclaim will not lie against a co-defendant as none of them involve the effect of the service, outside of the state in which the court is held, of a cross-complaint for a personal judgment, to which no summons was attached, and in which no general appearance was made by such nonresident cross-defendant.

## IV.

## The Rule That Equity Frowns Upon Multiplicity of Actions Is Not Applicable to the Present Situation.

Appellant cites two cases in this connection, neither of which can be found in any published index of cases. However, the rule that equity frowns upon multiplicity of actions is wholly inapplicable if the Court in which an action is pending has no jurisdiction over the person of the cross-defendant in respect to another cause of action sought to be litigated therein.

The United States District Court of the Southern District of California, Central Division, had no such jurisdiction over the person of Central Avenue Dairy, Inc., in respect to the cause of action stated in the cross-complaint as to enable the Court to determine the cause of action stated in such cross-complaint. The doctrine forbidding unnecessary multiplicity of actions has no application unless the joinder of several matters in one suit will really simplify and consolidate the issues; there is no avoidance of multiplicity of suits by simply uniting them in one proceeding. (See: *Parsons Construction Co. v. Gifford,* 262 N. W. 508, and *Hale v. Allison,* 47 L. Ed. 380.)

This reasoning is particularly applicable in the present case for the judgment entered on the complaint in interpleader [Tr. pp. 44-47] has entirely disposed of the issues raised by the complaint in interpleader and there is now no action pending by the plaintiff therein in respect to which the cause of action alleged in the cross-complaint can be germane.

Moreover, if the action in interpleader was still pending the issues in respect thereto would be entirely foreign to those presented by the cross-complaint and no avoidance of multiplicity would be achieved by uniting them in one action.

In *United Cig. Machine Co. v. Winston Cig. Mach. Co.*, 194 Fed. 947, plaintiff brought an action in equity against one of its stockholders for damages for breach of a contract and to enforce a lien on the stock issued by plaintiff to defendant for the amount of the judgment. Equity jurisdiction was invoked on the grounds of avoiding multiplicity of actions. But the Circuit Court of Appeals in affirming the order dismissing the action and in holding there were no grounds of equitable jurisdiction based on the avoidance of multiplicity of suits, said at page 962:

> "The bill presents no equity to avoid multiplicity of suits, no equity for discovery, accounting, or injunction. Therefore the doctrine that the equity court having jurisdiction for one purpose will do complete justice goes not so far as to embrace this case, as in it the sole right to equitable relief is dependent on and merely auxiliary to a disputed demand for unadjudicated damages."

In other words, an action *in personam* for damages is not relevant or germane to a cause of action to foreclose a lien, which is an action *in rem*.

## V.

### Rule 13(g) of the Federal Rules of Procedure Does Not Authorize the Determination of the Cause of Action Alleged in the Cross-Complaint Herein in the Present Action.

In this connection appellant cites and quotes from *Carter Oil Co. v. Wood,* 30 Fed. Supp. 887, to the effect that the Court should entertain all cross-bills and counterclaims related to the subject matter relied upon by the plaintiff and determine all questions necessary to a complete adjudication of all issues involved in the subject matter of the original complaint. In that case plaintiff sought to restrain defendant from interfering with plaintiff's rights as lessee under a lease from the First State Bank. Defendant filed a counterclaim seeking the cancellation of the bank's title predicated on a deed given to secure a debt owing by defendant to the bank and which debt the defendant offered to pay. The Court held that the counterclaim was germane to the original complaint and that jurisdiction of a non-resident defendant by substituted service was sufficient because the action involved title to real property rather than the recovery of a personal judgment. But in pointing out that if the counterclaim did not relate to the subject matter of plaintiff's cause of action the counterclaim would not lie, said at page 877:

> "It has been held that such a counterclaim, not being ancillary to the original complaint, cannot derive jurisdiction from the original bill but must present such an action as the federal court would have jurisdiction of as an independent suit."

In *Moore v. U. S. Cotton Exchange,* 270 U. S. 573, cited by appellant, plaintiff sought to have a contract between the defendant Cotton Exchange and the defendant

Telephone Company cancelled as constituting a monopoly and to compel the Cotton Exchange to furnish plaintiff with the quotations of the Cotton Exchange. The Cotton Exchange filed a counterclaim seeking to enjoin plaintiff from purloining its quotations. The Court held that the cause of action stated in the counterclaim arose out of the same transaction as the original complaint. However, no question of jurisdiction of the person of a non-resident defendant was involved.

Rule 13(g) of the Federal Rules does not authorize service of a cross-complaint outside of the state in which the court is held.

## VI.

### The Judgment in Favor of Hagan Entered Upon the Complaint in Interpleader Was Not Predicated on the Breach of the Contract by Central Avenue Dairy, Inc.

The appellant asserts that it has been adjudicated in the lower court that he was entitled to the money deposited with Title Insurance & Trust Company by reason of the breach of the contract by Central Avenue Dairy, Inc., and appellant should not be obliged to seek another tribunal to collect damages caused by the breach of the same contract. We have pointed out that the deposit was made by Hagan to secure to Central Avenue Dairy, Inc., the performance of the contract by Hagan. [Tr. p. 18.] Therefore, Hagan was entitled to the deposit if he performed his part of the contract and the determination that he was entitled to such deposit in nowise involved a determination of whether there had been any breach of the contract by Central Avenue Dairy, Inc. In fact it is to be noted that the default judgment in respect to the deposit does not

attempt to adjudicate any reason for awarding the deposit to Hagan, the judgment being confined to the declaration that Hagan is the only one who has laid claim to the said deposit and that no just cause appears for delaying the disbursement thereof to him. [Tr. p. 46.]

In *Freeman v. Bee Machine Co., Inc.,* 87 L. Ed. 1509, also cited by appellant, the Supreme Court held that the Circuit Court of Appeals properly reversed an order of the District Court denying a motion to amend the complaint alleging an additional cause of action after the case was transferred on defendants motion from the Massachusetts State Court to the Federal District Court in Massachusetts. The defendant was served personally in Massachusetts before the case was transferred to the Federal Court and appeared generally in the Federal Court and filed an answer and counterclaim. Such personal service in the state court and participation in the proceedings in the Federal Court clearly distinguishes *Freeman v. Bee Machine Co., Inc.,* from the instant case in that defendant Central Avenue Dairy, Inc., having been served with the cross-complaint outside of the State of California made no general appearance in response thereto. Appellant seems to think that all controversies between the parties should be adjudicated in one action even though the Court does not have jurisdiction of the person of the cross-defendant in respect to the cause of action alleged in the cross-complaint. This erroneous conception is set at rest by the decision in *Stitzel-Weller Dist., Inc., v. Norman, supra.*

Even though jurisdiction over the person of Central Avenue Dairy, Inc., in respect to the complaint in interpleader was properly obtained by personal service of process in Arizona pursuant to the provisions of Section

2361 of Revised Title 28, United States Code, and even though federal jurisdiction in respect to the cause of action alleged in the cross-complaint is predicated solely on diversity of citizenship and could, therefore, be commenced in the district in which the plaintiff resided (28 U. S. C. A. 112), there must be both proper venue and the service of the cross-complaint with summons thereon in the state in which the court is held.

In *Robertson v. Railroad Labor Board,* 69 L. Ed. 1119, the Court said at page 1122:

> "It is obvious that jurisdiction, in the sense of personal service within a district where suit has been brought, does not dispense with the necessity of proper venue. It is equally obvious that proper venue does not eliminate the requisite of personal jurisdiction over the defendant."

In *International Union etc. v. Tennessee Copper Co.,* 31 Fed. Supp. 1015, plaintiff sought an injunction against the defendants, that is, a judgment *in personam;* the Court said:

> "It is my judgment that the service on each of these defendants outside of this district and in another state is void and therefore the service is quashed and the complaint dismissed as to those defendants."

## Conclusion.

None of the cases cited by appellant, all of which we have herein analyzed, holds that the jurisdiction over the person of a non-resident defendant in respect to an action in interpleader confers any jurisdiction over the person of such non-resident in respect to a cause of action set forth in a cross-complaint seeking a personal judgment against such non-resident. The decision in *Stitzel-Weller Dist., Inc., v. Norman, supra,* is the only case which considers the question here presented and the decision in that case, as well as sound reasoning, requires the affirmance of the judgment dismissing the cross-complaint of Evert L. Hagan.

Respectfully submitted,

BODKIN, BRESLIN & LUDDY,

By HENRY G. BODKIN,

*Attorneys for Central Avenue Dairy, Inc., Appellee.*